LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 12 1966
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1304

BORRIS M. KOMAR, 349 East 49th Street, New York 17, N. Y.,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK, Office of Corporation Counsel, Municipal Building, Chambers Street, New York 7, N. Y.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BORRIS M. KOMAR,
Counsel for Petitioner,
349 East 49th Street,
New York 17, N. Y.
212—MU 8—3521

ACKERMAN PRESS, Phones BO 9-7107-8

INDEX

PETITION:

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statement	3
Reasons for Granting the Writ	7
POINT I—This is an ideal case to reconsider the rule in *Herb* v. *Pitcairn*, 324 U. S. 117, that state procedural rule serving legitimate state interest bars application of federal constitutional guarantees	7
POINT II—Prosecutor's tender to the trial court of known perjured testimony on the only question of fact tried, withholding of exculpating documentary proof in his possession and destruction of the credibility of petitioner's written and oral testimony violated due process of law in trial of criminal cases guaranteed by Fourteenth Amendment to the United States Constitution	15
POINT III—In the absence of hearings, all facts in the petition relating to the violation of due process of law are deemed true for all purposes of *coram nobis*	17
Conclusion	19
Verification	20

PAGE

CASES:

Alcosta v. Texas, 255 U. S. 28 16
Case v. Nebraska, 381 U. S. 336 11
Conizio v. New York, 327 U. S. 82 19
Davis v. Wechsler, 263 U. S. 22 9
Fay v. Noia, 372 U. S. 391 15
Gardner v. 1111 Corporation, 268 App. Div. 110 3
Gardner et al. v. Teamsters etc., Union et al., 346 U. S. 485 9
Herb v. Pitcairn, 324 U. S. 117 ..... 7, 8
Henry v. Mississippi, 379 U. S. 443 ..... 2, 8
Holly v. Smith, 280 Fed. (2) 536 18
Howell v. United States, 172 Fed. (2) 213 13
Hysler v. Florida, 315 U. S. 411 16
Jones v. Commonwealth of Kentucky, 97 Fed. (2) 335 14
Lea v. Beagell, 174 Misc. 6 3
Mesarosh v. United States, 352 U. S. 1 13
Napue v. Illinois, 360 U. S. 264 ..... 16, 17, 18
New York Central R. R. Co. v. N. Y. & Pennsylvania Co., 271 U. S. 124 10
People v. Caminito, 3 N. Y. (2) 596 9
People v. Fisher, 23 N. Y. Misc. (2) 391 14
People v. Savvides, 1 N. Y. (2) 554 14
Sanders v. United States, 373 U. S. 1 13
Staub v. City of Baxley, 355 U. S. 313 10
United States ex rel. Almeida v. Baldi, 195 Fed. (2) 815 19
United States v. Fay, 300 Fed. (2) 345 10

STATUTES:

U. S. Constitution:

Fourteenth Amendment 1, 2, 7, 12, 15
Bill of Rights 2
Judiciary Code, U. S. C. A., Section 1257, subd. 3 2
N. Y. C. P. R. & L., Rule 5522 2

TEXTS:

"Some Aspects of Federalism" by Hon. William J. Brennan 12

Supreme Court of the United States

OCTOBER TERM, 1965

No. .....

BORRIS M. KOMAR, 349 East 49th Street,
New York 17, N. Y.,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK, Office of Corporation Counsel, Municipal Building, Chambers Street, New York 7, N. Y.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Borris M. Komar, a member of the Bar of this Honorable Court for over forty years, respectfully requests that a writ of certiorari issue to review an order of said Court of Appeals of the State of New York affirming solely on alleged state procedural ground the dismissal of petitioner's application *coram nobis* to vacate a judgment of criminal conviction as procured by the prosecution by tender of known perjured testimony contrary to due process of law prescribed by the Fourteenth Amendment to the United States Constitution.

Opinions Below

No opinions were rendered in this case by the appellate state courts, but an opinion was rendered by the Criminal Court of the City of New York, where the *coram nobis* proceeding originated (R. p. 17). Under the express provisions of the New York Civil Practice Rules and Law governing the appeals, Rule 5522, if the appellate courts do not write opinions they are deemed not to have modified or reversed the opinion of the court appealed from.

Jurisdiction

The Court of Appeals affirmed the order dismissing the *coram nobis* proceeding (Mr. Justice John Van Voorhis dissenting and voting for reversal) on December 24, 1965 (16 N. Y. (2) 993), and an application for reargument was duly and timely made and denied on January 6, 1966. By an order of March 29, 1966, Hon. John M. Harlan, associate Justice of this Honorable Court extended the time of the petitioner to file his petition for certiorari to and including May 16, 1966. The jurisdiction of this Honorable Court is invoked by 28 U. S. C. A. Judiciary Code, Section 1257, subd. 3.

Question Presented

This case presents the question left expressely undecided by this Honorable Court in *Henry* v. *Mississippi*, 379 U. S. 443, namely, whether the state court may deny to a citizen accused of crime the guarantee of due process of law prescribed by the Fourteenth Amendment to the United States Constitution solely on the ground of adequate state procedural ground. No question of total or selective application of any Amendments comprising the Bill of Rights is involved, but a direct question of due process by prosecutor's tender of known perjured testimony on the

controlling question in the case and the withholding of exculpating written proof held by the prosecutor. No question of fact is involved as no hearings were held on the petition for *coram nobis,* and it was dismissed solely as a matter of law.

Statement

Petitioner inherited a vacant one-story brownstone building at 166 West 94th Street, New York City. The lodgers in adjoining boarding houses on each side of it threw garbage into the yard and the front areaway. Every two months petitioner hired a garbage truck to remove the garbage, the last time on November 10, 1958 (R. p. 9).

On December 12, 1958, Leroy J. Walker, purchased the house and took full possession of it. Walker then formed and paid all the fees of a New York corporation under the name of Amcol Residences, Inc. Walker took title to the house in the corporate name on January 8, 1959, and on the same day executed as Vice-President a mortgage and a bond to petitioner. All documents were notarized on January 8, 1959 (R. p. 9).

Petitioner was charged with the violation of Sections 53 and 183 of the Sanitary Code of the City of New York dealing with garbage nuisance as of February 26, 1959. The sole defense and the sole question tried was whether on February 26, 1959 the petitioner had title to said brownstone (R. p. 9). In New York delivery of deed without filing or registration anywhere transfers title (*Lea* v. *Beagell,* 174 Misc. 6; 19 N. Y. Supp. (2) 613). Walker was the sole stockholder, officer and director of Amcol Residences, Inc. Petitioner as mere mortgagee, not in possession, was not responsible under New York law for the condition of the said brownstone (*Gardner* v. *1111 Corporation,* 268 App. Div. 110; 141 N. Y. Supp. (2) 552, aff'md 1 N. Y. (2) 758).

According to the affidavit of Mr. Hinchey, assistant to the prosecutor, filed in the court by the latter, the prosecutor when preparing Walker to testify as his witness had before him Walker's application for the alteration of said brownstone filed by Walker with the City of New York *on January 21, 1959,* in which Walker, an experienced real estate broker, well informed as to the meaning of all real estate terms, certified to the City that "Amcol Residences, Inc. * * * *is sole owner of*" said brownstone. Walker's architect, Kraus, certified that Amcol "*is the owner in fee*" of said brownstone. Both certified *that the only persons "interested* in said premises and projected multiple dwelling" were Walker and his secretary Hawkins. The application was signed by Walker as "*owner*". Walker correctly omitted the petitioner, as he was a mere mortgagee (R. pp. 11, 12 and 13).

The prosecutor brought the application into the Court on February 19, March 15 and April 5, 1960, but did not bring it on the day of trial, April 20, 1960 (R. p. 11). On that day, the prosecutor produced Walker as his only witness, who testified that the deed, the mortgage and the bond were executed by him between March 13 and 19, 1959 (R. p. 10). The petitioner never saw the said Walker's application until after the trial (R. p. 13). On the trial, Mr. Justice Creel, one of the judges of the Court of Special Sessions, said:

> "Mr. Komar, might suggest to you, you are not going to be able to prove through this witness that these documents were executed at any other time than that date of March, which he (Walker) keeps repeating" (R. p. 10).

The prosecutor, who held the original application of Walker, filed with the City asserting that on January 21, 1959 title was in Amcol Residences, Inc. and that Walker as its sole stockholder was "owner" of the brownstone,

deliberately withheld the production and the tender to the Court of this exculpatory evidence, conclusively establishing the perjury of Walker.

Furthermore, the prosecutor according to the affidavit of his assistant, Mr. Hinchey (R. p. 11), knowingly and deliberately tendered perjured testimony on the only question of fact involved in the prosecution of your petitioner (R. p. 13).

Petitioner, a reputable lawyer of fifty years' standing, testified that the deed, mortgage and the bond were all executed and delivered on January 8, 1959. The notary public, also a reputable lawyer of thirty years of practice, corroborated petitioner. The Court of Special Sessions rejected the documentary proof and the said oral testimony, and said:

> "Justice Ringel: In imposing sentence in this case, Mr. Komar, the Court is taking into consideration that this Bench has recommended certain action by the Bar Association in your case, as well as further investigation for further action with respect to some suspicions of perjury on the trial of this case * * *" (R. p. 8).

Thus, withholding by the prosecutor of said Walker's application for the alteration of said brownstone resulted in the destruction of the credibility of the documentary and oral proof of petitioner, and in his conviction by false and perjured testimony of a single uncorrborated witness for the prosecution deliberately coached to render perjured testimony (R. p. 13), probably in exchange for immunity from prosecution as vice-president of Amcol Residences, Inc., the owner, an officer thereof actually in charge of the brownstone and responsible for its condition.

After trial, petitioner procured said application of Walker of January 21, 1959 from the city records, and

moved for a new trial, which motion was denied (R. p. 13). The petitioner appealed from his conviction and the denial of said motion urging the grounds of important new evidence and unethical conduct of the prosecutor, but through honest oversight omitting any constitutional violation grounds. The conviction was affirmed (14 App. Div. (2) 837). This is admitted by the respondent in its answer to *coram nobis* petition, where it said:

> "The only perceptible difference is *that he now cloaks his defenses with the veil of deprivation of his constitutional rights*" (R. p. 17).

Petition *coram nobis* was expressly based (R. p. 8) on the violation of due process of law on the trial herein by the prosecutor in tendering to the court known perjured testimony on the only fact tried in the case (R. pp. 19-20), as guaranteed by the Fourteenth Amendment to the United States Constitution. The questions of federal constitutional law were fully briefed and argued in all state courts. The answer as shown by the record is an independent adequate state procedural ground, apparently held by the state courts to serve the state's legitimate interest:

> "I find no basis for coram nobis relief. The motion is denied. Coram nobis may not be used as a substitute for appeal" (R. p. 28).

Of course, the petitioner at the time he applied for *coram nobis* relief has exhausted his remedies of a motion for a new trial and of appeal, and had no other post conviction state remedy open to him.

Petitioner was sentenced guilty of misdemeanor, fined $500, which he paid, and got a suspended sentence of three months in a workhouse.

Petitioner seeks to clear his personal record unblemished by any other accusations for almost three-quarters of a century.

REASONS FOR GRANTING THE WRIT*

POINT I

This is an ideal case to reconsider the rule in *Herb* v. *Pitcairn*, 324 U. S. 117, that state procedural rule serving legitimate state interest bars application of federal constitutional guarantees.

No question of fact is involved in this case (Point III, *infra*, at pp. 17-19). The state courts impliedly held that the state procedural rule prohibiting the consideration of the violation of federal constitutional guarantee of due process of law in state criminal trials is a legitimate state interest. That state rule in New York fails to provide any post-conviction remedy for violation of said federal constitutional guarantee, except by a direct appeal, and prohibits a *coram nobis* application based on the same facts as appeared in the record on appeal, although the federal constitutional questions were not briefed or argued on the appeal. The problem has three aspects:

a. Shall the state procedural rules, even serving state legitimate interests, be permitted to bar the application of federal constitutional guarantees for the protection of life and liberty of a citizen;

b. Should the states be compelled to provide an adequate state post conviction procedures for the consideration of violations of said federal constitutional guarantees.

c. What is the effect on the substantive and procedural rulings of the state criminal court of the violation of due process of law on the trial of material issues demanded by the Fourteenth Amendment to the United States Constitution.

---

* Italics are ours, unless otherwise indicated.

A.

The question as to said rule in *Herb* v. *Pitcairn, supra,* was recently raised in *Henry* v. *Mississippi,* 379 U. S. 443, but was not decided, because this Court there held that the procedural rule there relied on did not serve legitimate state interest. However, Mr. Justice Brennan speaking for the majority of the Court said at pages 446-7:

> "Under the view taken in Murdock v. City of Memphis, 20 Wall. 590 of the statutes conferring appellate jurisdiction on this Court, we have no power to revise judgments on questions of state law. Thus, the adequate nonfederal ground is necessary to avoid advisory opinions.
>
> *These justifications have no applications where the state ground is purely procedural.* A procedural default which is held to bar challenge to a conviction in state courts, even on federal constitutional grounds, prevents implementation of the federal right."

Mr. Justice Black, who dissented on another point, concurred with the majority on this point and said at pages 453-4:

> "Petitioner contends that his conviction was based in part on evidence obtained by an allegedly unlawful search in violation of the United States Constitution. I would decide this federal question here and now. *I do not believe that the Mississippi procedural trial rule relied on by the State can shut off this Court's review,* nor do I find a particle of support for the Court's suggestion that petitioner knowingly waived his right to have this constitutional question decided by the state trial court."

The rule in *Herb* v. *Pitcairn, supra,* so far as it relates to state procedural rule as a bar of the application of

federal constitutional or statute law was repeatedly rejected by this Court, and should be expressly overruled.

In *Davis* v. *Wechsler,* 263 U. S. 22, Mr. Justice Holmes said at page 24:

> "We are of opinion that the judgment must be reversed. Whatever springs the States may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. * * * The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right. The principle is general and necessary. Ward v. Love, 253 U. S. 17, 22."

Said this Court in *Gardner et al.* v. *Teamsters etc., Union et al.,* 346 U. S. 485 at pages 500-501:

> "We conclude that when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land, *and cannot be curtailed, circumvented or extended by a state procedure* * * *".

In *People* v. *Caminito,* 3 N. Y. (2) 596, the Court quashed the convictions of two appealing codefendants for violation of due process of law, but refused such relief to Noia, the third defendant, because he did not join in the appeal. In reversing unanimously in *Fay* v. *Noia,* 372 U. S. 391, this Court said at page 426:

> "* * * we have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings. *State procedural rules plainly* must yield to this *overriding federal policy.*"

In the same case, *United States* v. *Fay*, 300 Fed. (2) 345, U. S. Circuit Court of Appeals for the Second Circuit said at page 345:

> "There is no more unenlightened or cruel anachronism than an unbending reliance upon the niceties of procedure in derogation of substantive rights. Procedures exist, or ought to exist, for the purpose of effectuating rights, not denying them. Cf. Sheldon v. Metro Goldwyn Pictures Corp., 106 Fed. (2) 45, aff'md 309 U. S. 390. When substantive rights are clear we should be most hesitant to sacrifice those rights on the altar of local practice."

In *N. Y. Central R. R. Co.* v. *N. Y. & Pennsylvania Co.*, 271 U. S. 124, this Court said at pages 126-7:

> "The State courts were of opinion that the plaintiffs in error waived their rights by the failure to appeal from a decision on an earlier complaint to the State Commission • • •.
>
> In our opinion the failure to appeal from the former order is no bar. We do not undertake to review the decision of the Supreme Court as to State procedure, but if the railroads were too late to argue their case before that Court they are not too late to argue it here."

In *Staub* v. *City of Baxley*, 355 U. S. 313, this Court said at pages 319-20:

> "Appellee also contends that the holding of the Court of Appeals, that appellant's failure to attack 'specific sections' of the ordinance rendered it unnecessary, under Georgia procedure, 'to pass upon' the constitutionality of the ordinance, • • •.
>
> For these reasons, the ordinance, on its face, imposes an unconstitutional prior restraint upon the enjoyment

of First Amendment freedoms and lays 'a forbidden burden upon exercise of liberty protected by the Constitution. Cantwell v. Connecticut, 310 U. S. 296. Therefore, the judgment of conviction must fall."

B.

In *Case* v. *Nebraska*, 381 U. S. 336, this Court granted the writ of certiorari to decide the question whether the Federal Constitution compels the States to provide adequate post conviction procedure to consider complaints based on alleged violations of federal constitutional guarantees. While the facts as therein developed did not permit the decision on that question it was passed upon in the opinions of the Court.

Mr. Justice Clark in concurring said at page 338:

"The doctrine of exhaustion of state remedies, to which this Court required the scrupulous adherence of all federal courts * * * presupposes that some adequate remedy exists. We recognize the difficulties with which the Illinois Supreme Court is faced in adapting available state procedures to (this) requirement * * *. Nevertheless, that requirement must be met. Young v. Ragen, 337 U. S. 239 at 238-9 * * *.

There exists in some States a wide variety of procedural techniques that have been used to deal with due process attacks on criminal convictions, i.e. basic common law remedies such as habeas corpus, coram nobis and delayed motions for new trial. But the great variations in the scope and availability of such remedies result in their being entirely inadequate."

Mr. Justice Brennan, also concurring, said in the same case at page 344:

"The Fourteenth Amendment and the Supremacy Clause make requirements of fair and just procedures

> an integral part of those (state) laws, and state procedures should ideally include adequate administration of these guarantees as well."

Mr. Justice Brennan in his paper on "Some Aspects of Federalism" (N. Y. University Law Review, vol. 39 (1964) said at pages 948 and 958:

> "Third, after Fay v. Noia, 372 U. S. 293, it seems clear that there is no place for rigid and technical doctrines of forfeiture, waiver or default in a system of post conviction remedies. In the absence of some deliberate bypassing or flouting of orderly procedures by a state prisoner, he is entitled to a determination of the merits of a substantial federal constitutional claim * * *."
>
> "* * * that upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted and secured by the Constitution of the United States."

All the courts of the State of New York failed in this case to fulfill this obligation. Does that mean that this Court will decline to enforce the Fourteenth Amendment of the United States Constitution when on the admitted facts herein, the conviction of the petitioner was obtained by perjured testimony of the witness produced by the prosecutor and the prosecutor's concealment of city record held by him proving perjury of his witness.

C.

The production of false witness and concealment of proof of the falsity of his evidence by the prosecution is not only an injury to the accused defendant in a criminal trial, but is a fraud on the court. That being the case, it is immaterial what the defendant does or does not do, as the administration of justice as such is defiled. Furthermore,

if the defilement results in the lack of due process during the trial, its results are immaterial. Whether such trial rests on substantive or procedural independent state grounds, it is a legal nullity and all these grounds are void.

In *Mesarosh* v. *United States,* 352 U. S. 1, this Court said at page 14:

> "Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted."

In *Sanders* v. *United States,* 373 U. S. 1, this Court said at page 8:

> "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."

In *Howell* v. *United States,* 172 Fed. (2) 213, the Court of Appeals for the Fourth Circuit said at page 215:

> "It is elementary that neither habeas corpus nor motion in the nature of application for writ of error coram nobis can be availed of in lieu of writ of error or appeal, to correct errors committed in the course of a trial, even though such errors relate to constitutional rights.
>
> It is only when there has been the denial of substance of a fair trial that the validity of the proceedings may be thus collaterally attacked or questioned by motion in the nature of petition for writ of coram nobis or under 28 U. S. C. A. 2255. Birtch v. United States, 164 F. 2d 880; Pifer v. United States, 158 F. 2d 867; Eury v. Huff, 141 F. 2d 554; Sanderlin v. Smyth, 138 F. 2d 729; United States v. Brady, 133 F. 2d 476, 481."

In *Jones* v. *Commonwealth of Kentucky,* 97 Fed. (2) 335, the Circuit Court of Appeals for the Sixth Circuit unanimously said at page 338:

> "If it be urged that the concept thus formulated but condemns convictions obtained by the state through testimony known by the prosecuting officers to have been perjured, then the answer must be that the facts of that case require, and that 'the fundamental conceptions of justice which lie at the base of our civil and political institutions' must with equal abhorrence condemn as a travesty a conviction upon perjured testimony, if later, but fortunately not too late, its falseness is discovered, and that the state in the one case as in the other is required to afford a corrective judicial process to remedy the alleged wrong, if constitutional rights are not to be impaired."

Even under New York State law when *coram nobis* is based on the violation of the due process of law constitutionally guaranteed, the merits of the prosecution are immaterial.

In *People* v. *Savvides,* 1 N. Y. (2) 554, the Court said said at page 557:

> "Nor does it avail respondent to contend that defendant's guilt was clearly established or that disclosure would not have changed the verdict."

In *People* v. *Fisher,* 23 N. Y. Misc. (2) 391, the Court said at page 402:

> "The guilt or innocence of the petitioner is not in issue in this proceeding. The question of due process of law as it relates to coram nobis relief is in issue."

It follows, that all attempts to take refuge in independent state substantive or procedural rulings in a case where due process of law was disregarded during the trial are futile,

and such conviction should be set aside by this Court, as a guardian of the elementary guarantees of life and liberty under the Fourteenth Amendment to the United States Constitution.

In *Fay* v. *Noia*, 372 U. S. 391, this Court said at page 428:

> "A defendant by committing a procedural default may be debarred from challenging his conviction in the state courts even on federal constitutional grounds. But a forfeiture of remedies does not legitimize the unconstitutional conduct by which his conviction was procured * * *.
>
> In what sense is Noia's custody not in violation of federal law simply because New York will not allow him to challenge it on coram nobis or on delayed appeal?"

POINT II

Prosecutor's tender to the trial court of known perjured testimony on the only question of fact tried, withholding of exculpating documentary proof in his possession and destruction of the credibility of petitioner's written and oral testimony violated due process of law in trial of criminal cases guaranteed by Fourteenth Amendment to the United States Constitution.

Since no hearings in this case were requested by the respondent and none granted by the state courts, all the allegations of fact in the petition *coram nobis* are deemed to be true for all its purposes, and the petition is deemed to have been dismissed solely as a matter of law (see Point III next following at pp. 17-19).

The allegations of fact in the petition admitted by the respondent are as follows:

> "2. That this application is brought upon the grounds that your petitioner was denied a fair trial within the

meaning of due process * * * inasmuch as his said conviction was based on perjured testimony submitted by the people and known to have been such (R. p. 8).

"9. People in producing Walker knew that his testimony was a perjury refuted not only by the title papers themselves, but also by city records prepared and filed by Walker and his architect before any controversy arose between Walker and your petitioner * * *. So the people actively and deliberately deceived the court and obtained your petitioner's conviction by prefabricated perjurious oral proof" (R. p. 13).

"10. Your petitioner did not see the Alteration Application No. 101 before April 20, 1960, the said trial's date but after the trial inspected it for the first time at the said Building Department, and on said city record moved to set aside said conviction and for a new trial. The Court of Special Sessions denied said motion without opinion, and continued to act and rely on said perjurious testimony of Walker as shown in paragraph 3 above" (opinion of Judge Ringel at R. p. 8) (R. p. 13).

Conviction of an accused of crime by the use of false testimony, whether known to the prosecutor as such or discovered later to have been such constitutes violation of due process of law guarantee for criminal trials demanded of the state criminal courts by the Fourteenth Amendment to the United States Constitution (*Napue* v. *Illinois*, 360 U. S. 264, 271-2; *Alcosta* v. *Texas*, 255 U. S. 28; *Hysler* v. *Florida*, 315 U. S. 411).

Similarly, withholding of exculpatory city record held by the prosecutor and showing an admission by the prosecutor's false witness that on January 21, 1959 long before March, 1959 (testified to by the witness, Walker, a licensed real estate broker) he and his architect Kraus (R. pp. 11-13), both certified to the city that title to the brownstone in question was in Amcol Residences, Inc. and that the peti-

tioner had no interest therein (R. p. 12) constituted violation of due process of law guaranteed to the accused of crime in state courts by the said Amendment (*Napue* v. *Illinois,* 360 U. S. 264, 269; *Alcosta* v. *Texas,* 255 U. S. 28).

Here the trial court not only rejected the deed, mortgage and bond, the last two signed by false witness Walker, and notarized on January 8, 1959, but also the oral testimony of the petitioner and of notary, both reputable lawyers of many years standing in favor of uncorroborated false testimony of Walker, thereby denying any credibility to petitioner's written and oral proof. The trial court, in sentencing petitioner, said:

> "In imposing sentence in this case, Mr. Komar, the Court is taking into consideration that this Bench has recommended certain action by the Bar Association in your case, *as well as further investigation for further action with respect to some suspicions of perjury on the trial of this case* * * *" (R. p. 8).

Petitioner since the trial never had been informed of any investigation or of any action by the Bar Association against him.

Deprivation of credibility of an accused's proof by the prosecutor in a criminal case through the use of a false witness is also a denial of due process of law under said Amendment (*Napue* v. *Illinois,* 360, U. S. 264, 269.)

POINT III

In the absence of hearings, all facts in the petition relating to the violation of due process of law are deemed true for all purposes of *coram nobis*.

Respondent never asked for any hearings, and the state courts dismissed the application *coram nobis* of the petitioner without ordering any hearings merely as a matter of law.

When the question before this Court concerns alleged deprivations by the state courts of Federal constitutional guarantees, it makes its own examination and the estimation of the facts in the record.

In *Napue* v. *Illinois,* 360 U. S. 264, this Court said at pages 271-2:

> "The duty of this Court to make it's own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate. Martin v. Hunter's Lessee, 1 Wheat. 304; Cooper v. Aaron, 358 U. S. 1; Niemotko v. Maryland, 340 U. S. 268, 271; Kern-Limerick, Inc. v. Scurlock, 347 U. S. 110, 121."

And see additional cases collected by the Court in Note 1 on page 272 of the same case.

It is settled federal rule that where no hearings are held on a petition *coram nobis* in the state courts, then for all the purposes of the proceeding all the allegations of fact in the petition are deemed true.

In *Holly* v. *Smith,* 280 Fed. (2) 536, the Court of Appeals for the Fourth Circuit said at page 537:

> "Since the petition was dismissed without a hearing, as failing to state grounds for relief, we must for the purposes of this appeal, accept as true the facts alleged in the petition along with the accompanying exhibits, which with the order of the District Court, constitute the entire record."

In Note 1 of the same case, the Court said at pages 537-8:

> "Smith v. O'Grady, 312 U. S. 329; Williams v. Kaiser, 323 U. S. 471; Tomkins v. State of Missouri, 323 U. S. 485; House v. Mayo, 324 U. S. 42; Rice v. Olson, 324

U. S. 786; Palmer v. Ashe, 342 U. S. 134; Massey v. Moore, 348 U. S. 105; Commonwealth of Pennsylvania ex rel. Herman v. Claudy, 350 U. S. 116; Cash v. Culver, 358 U. S. 633. In all of these cases, the petitioners alleged denial of their right of counsel under the Fourteenth Amendment, and, because the petitions were dismissed without hearings in the courts below, the Supreme Court accepted the allegations as true and decided the constitutional questions presented."

In *United States ex rel. Almeida* v. *Baldi,* 195 Fed. (2) 815, the Court of Appeals for the Third Circuit said at page 822:

"Under such circumstances the allegations of the petition that 'vital evidence' was wilfully concealed must be taken to be true, since no hearing was had. See Williams v. Kaiser, 323 U. S. 471."

Accord: *Conizio* v. *New York,* 327 U. S. 82, 85.

CONCLUSION

Wherefore, your petitioner respectfully prays that his petition for a writ of certiorari to the Court of Appeals of the State of New York be granted, and the said writ be issued to the said Court.

BORRIS M. KOMAR,
Petitioner.

Respectfully submitted,

BORRIS M. KOMAR,
Counsel for Petitioner,
349 East 49th Street,
New York 17, N. Y.

212-MU-8-3521.

VERIFICATION

CITY, COUNTY and STATE of NEW YORK: SS:

BORRIS M. KOMAR, being duly sworn, deposes and says:

That he is the above named petitioner; that he has read the foregoing petition and that the statements therein are true to his own knowledge.

BORRIS M. KOMAR.

Sworn to before me this
May 11, 1966.

ARTHUR PALEY,
Notary Public,
State of New York.
No. 41-3000300.
Qualified in Queens County.
Cert. filed in New York County.
Commission expires March 30, 1967.

(SEAL)

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 6 1966
JOHN F. DAVIS, CLERK

(38413)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1304

BORRIS M. KOMAR,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

J. LEE RANKIN
Corporation Counsel
Attorney for Respondent
Office and Post Office Address
Municipal Building
New York, N. Y. 10007

SEYMOUR B. QUEL,
of Counsel

Adams Press Corp., 130 Cedar Street, N. Y.—Beekman 3-1050 110

TABLE OF CONTENTS

	PAGE
Statement	1
Question Presented	2
Petition and answering affidavit in coram nobis	3
The Facts	4
The Decisions Below	8
ARGUMENT—Coram Nobis was properly denied. No substantial federal question is presented herein since all alleged errors not only appeared on the face of the record but also were part of the basis for an unsuccessful motion for a new trial and a lost appeal (14 A D 2d 837). Moreover, there was a complete absence of proof that the conviction was obtained by the fraudulent use of perjured testimony or that the prosecution knowingly withheld evidence favorable to the petitioner	9
CONCLUSION	18

Cases Cited

Adams v. United States ex rel Mc Cann, 317 U. S. 269 (1942)	13
Matter of Hogan v. Court of General Sessions, 296 N. Y. 1 (1946)	13
Howell v. United States, 172 F. 2d 213 (C A 4th Cir., 1949), cert. den. 337 U. S. 906 (1949)	14
Kyle v. United States, 266 F. 2d 670 (C A 2nd Cir., 1959), cert. den. 361 U. S. 870 (1959)	10, 11

PAGE

Lyons v. Goldstein, 290 N. Y. 19 (1942) 14

Matter of Morhous v. Supreme Court, 293 N. Y. 131 (1944) 10

McGuinn v. United States, 239 F. 2d 449 (C A D C Cir., 1956) 11

Morgan v. United States, 346 U. S. 502 (1954) 13

Napue v. Illinois, 360 U. S. 264 (1959) 14

People v. Bell, 31 Misc 2d 814 (Gen. Sess., N. Y. Co., 1961), aff'd 16 AD 2d 624 (1st Dept., 1962), cert. den. 371 U. S. 872 (1962) 10, 11

People v. Brown, 13 N Y 2d 201 (1963), cert. den. 376 U. S. 972 (1964) 13

People v. Chodorov, 12 N Y 2d 176 (1962), cert. den. 375 U. S. 46 (1963) 11

People v. Costello, 8 N Y 2d 954 (1960), cert. den. 365 U. S. 852 (1961), reh. den. 366 U. S. 915 (1961) 14

People v. Cross & Brown Co., 277 N. Y. 701 (1938) ... 11

People v. Eastman, 306 N. Y. 658 (1953) 13

People v. Fisher, 4 N Y 2d 943 (1958) 14

People v. Howard, 12 N Y 2d 65 (1962), cert. den. 374 U. S. 840 (1963) 13

People v. Kendricks, 300 N.Y. 544 (1949) 13

People v. Komar, 10 AD 2d 667 (1st Dept., 1960) 13

People v. Oddo, 300 N.Y. 649 (1950), cert. den. 339 U.S. 961 (1950) 14

People v. Sadness, 300 N.Y. 69 (1949), cert. den. 338 U.S. 952 (1950) 13, 14

PAGE

People v. Savvides, 1 N Y 2d 554 (1956) 14

People v. Schwartz, 12 N Y 2d 753 (1962) 13

People v. Shapiro, 3 N Y 2d 203 (1957) 13

People v. Sullivan, 3 N Y 2d 196 (1957) 13

People v. White, 285 App. Div. 1045 (1st Dept., 1955), aff'd 309 N.Y. 636 (1956), cert. den. 352 U.S. 849 (1956) 13

Smith v. Feigin, 273 App. Div. 277 (1st Dept., 1948), aff'd 298 N.Y. 534 (1948) 17

United States v. Aderman, 216 F. 2d 564 (C. A. 7th Cir., 1954) 14

United States v. Gernie, 287 F. 2d 637 (C. A. 2nd Cir., 1961) 14

United States v. Rosenberg, 200 F. 2d 666 (C A 2nd Cir., 1952) 14

United States v. Smith, 306 F. 2d 457 (C A 2nd Cir., 1962) 13, 14

United States v. Walker, 197 F. 2d 287 (C A 2nd Cir., 1952) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1304

BORRIS M. KOMAR,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Statement

The petitioner seeks to have this Court review by writ of certiorari, an order of the Court of Appeals of the State of New York, entered November 24, 1965, which, by a divided Court (VAN VOORHIS, dissenting and voting to reverse and direct a hearing), affirmed without opinion an order of the Supreme Court, Appellate Term, First Department, entered June 3, 1965, which had unanimously affirmed without opinion, an order of the Criminal Court of the City of New York, County of New York, entered February 3, 1965, denying his application for a writ of error, *coram nobis*. Peti-

tioner sought an order from the Criminal Court, "vacating and expunging from the records" a judgment of conviction entered against him by the former Court of Special Sessions, New York County, on July 7, 1960, after a trial, for violations of Sanitary Code, §§53 and 183, pertaining to "[n]uisances, conditions dangerous and prejudicial to life and health; * * *" and the sentence of the Court, a $500 fine or six months in the penitentiary plus three months in the workhouse. Execution of the workhouse sentence was suspended pending the defendant's future "good behavior." The fine was paid.

Following his conviction, defendant's motion for a new trial and his appeal from the judgment of conviction, both grounded on substantially the same assertions raised herein, were respectively denied by the Trial Court and unanimously affirmed without opinion by the Appellate Division, First Department in 14 A D 2d 837 and leave to appeal to the Court of Appeals was denied by FULD, J. on March 6, 1962.

The affirmance in the Court of Appeals of the order denying the writ of error, *coram nobis* is reported in 16 NY 2d 993, 212 N. E. 2d 894 (1965).

Question Presented

The primary issue presented is whether a writ of *coram nobis* may be used as a vehicle for an additional appeal, where all alleged errors not only appeared on the face of the record but also were part of the basis for an unsuccessful motion for a new trial, a lost appeal in the Appellate Division, First Department and finally an abortive attempt to appeal to the Court of Appeals. In any event, assuming *arguendo* that such a writ may properly be invoked, its denial herein presents no substantial federal question in the complete absence of proof that petitioner's conviction was obtained either by fraudulent use of perjured testimony or by withholding evidence favorable to him.

Petition and Answering Affidavit in *Coram Nobis*

The petitioner alleges that he "was denied a fair trial" within the meaning of the Fourteenth Amendment to the Constitution "inasmuch as his said conviction was based on perjured testimony submitted by the People * * *" (8*). The petition alleges further that as part of the People's proof, perjured testimony was offered by one Leroy J. Walker to the effect that the petitioner was the record owner of 166 West 94th Street, Manhattan up to March 19, 1959; that the People knew that such testimony was false and nevertheless withheld "exculpatory evidence" to the contrary; that the Court of Special Sessions was "under the influence of said perjured testimony" when it found him guilty and pronounced sentence and finally that the Court recommended "certain action by the Bar Association with respect to some suspicions of perjury or subornation of perjury on the trial of this case; * * *" but that "no action whatever was taken by the Bar Association during" the four years following his conviction (10, 12-13, 8).

The answering affidavit of the respondent denied *in toto* the unfounded charges contained in the petition and alleged that the matters raised by the petition were previously presented by the petitioner in a motion for a new trial and in an unsuccessful appeal except for the charge of alleged deprivation of constitutional rights (15-21).

Petitioner's reply affidavit charged further that his prosecution was motivated solely by the "spiteful revenge" of municipal authorities and reiterated the charge that the City knew that the petitioner was not the record owner of the premises (22-23).

---

* Numbers in parentheses, unless otherwise indicated, refer to the pages of the Record on Appeal in the Appellate Term, First Department.

The Facts

(1)

The charged violations of the Sanitary Code on which the petitioner, the defendant below, stands convicted arose out of insanitary conditions and the presence of rodents existing in the premises at 166 West 94th Street, Manhattan on February 26, 1959, and "prior thereto". Upon the trial, the defendant did not contest the fact that such conditions existed. The Public Health Sanitarian testified for the People that on February 26, 1959, he inspected the premises, a four story brick building, which was vacant and "semi-boarded up" (*People* v. *Komar,* Record on Appeal, fols. 73-74, 77*). The inspector was unable to gain entrance to the building but described the surrounding area as follows (*id.,* fol. 78):

> "The rear yard was covered with an assortment of rubbish; the area covered all the rear yard was between 75 and 90 per cent of it, the rubbish consisted of lumber, paper, garbage, and also there was a large accumulation of water, and this comprised about 50 per cent of the area of the rear yard."

He said the water in the rear yard was 5 or 6 inches deep and stagnant and there were from four to six live rats running about the yard (*id.,* fol. 79). The rats observed on this date were known as Norwegian rats and were from a foot to 15 inches in length (*id.,* fol. 80). The inspector found rat droppings about the yard and in the front of the building and the front stairwell was completely covered with garbage and discarded furniture (*id.,* fols. 81, 79).

---

* Record on Appeal from criminal conviction (14 AD 2d 837), to be submitted together with this brief.

The inspector described conditions on the premises as "optimum" for rodent breeding by reason of the presence of the accumulated rubbisn and water (*id.*, fol. 113). The building was only partially sealed in that the rear was entirely open and the front was boarded only below the second floor which permitted the ingress and egress of rats to and from the premises (*id.*, fols. 84-85). There were occupied multiple dwellings on both sides of the instant premises and it was the inspector's testimony that the condition which was described constituted a public health nuisance (*id.*, fols. 119, 115).

(2)

The People then called Leroy J. Walker, a real estate broker who testified that his first contact with the defendant took place in June, 1958 when he received a letter from him indicating that he, Komar, was interested in renovating the premises and was looking for a builder "interested in taking part ownership of the building" (*id.*, fols. 175-179, Peo.'s Exh. 5, 206). Thereafter, Walker went to see the defendant and offered to provide for the financing, construction and a permanent first mortgage on the building. Defendant agreed to his proposals and suggested that a corporation be formed in which he and Walker would each own 50% of the stock. Title to the premises was to be conveyed to the corporation (*id.*, fol. 183).

The agreement between Walker and the defendant, as finally reduced to writing is dated December 12, 1958 (*id.*, Peo.'s Exh. 6, pp. 207-212), and sets forth that the defendant would hold all shares of the stock in escrow until the work was completed (*id.*, fols. 186-187, 623-624); that the defendant was to be president of the corporation and that all corporate checks were to be countersigned by him (*id.*, fol. 623); that all officers and directors were to execute blank resignations to be held by the defendant as security for the performance of the contract (*id.*, fol. 624);

that the mortgage and building loan, as well as all contracts and disbursements, were to be subject to defendant's approval (*id.*, fols. 625-626); and finally upon the procurement of the first mortgage, defendant would be paid $20,000 as purchase price of the property (*id.*, fol. 627).

Upon the delivery of the deed to the corporation, the defendant was to receive a $20,000 purchase money mortgage (*id.*, fol. 627, Peo.'s Exh. 3, pp. 186-195). The defendant and his directors then agreed to resign and deliver their stock to Walker upon the payment of $10,000 towards the satisfaction of this mortgage (*id.*, fols. 630-631).

Early in 1959 Walker on behalf of the Amcol Corporation, the newly formed corporate entity, applied to the Embar Funding Corporation for a $22,000 loan for the temporary remodeling of the building but he was told that Amcol was not the owner of record (*id.*, fol. 190). Walker reported this fact to Komar who said that he "would take care of it" (*id.*, fol. 190). Thereafter, on or about March 13, 1959, Walker executed the purchase money mortgage (*id.*, Peo.'s Exh. 3, fols. 558-594) in defendant's office (*id.*, fol. 192). According to Walker's testimony, he did not check the date of this document which appears as January 8, 1959 (*id.* fol. 192). He testified further that he never received any shares of Amcol stock and never attended a stockholders' meeting of the Amcol Corporation (*id.*, fol. 213). Walker said that he paid Embar Corporation the sum of $500 as a deposit on the construction loan but never received any money from the defendant for any services in connection with the property (*id.*, fol. 216).

Anita Marra, who was listed in the certificate of incorporation of Amcol Corporation as one of the three directors (cf., Peo.'s Exh. 4, fols. 595-609), testified that in December, 1958 she was employed by J. C. Swaim, an attorney with offices adjacent to defendant's (*id.*, fol. 170); that although

she is listed as a director of the corporation, she never exercised any function of an officer or director, nor did she receive the share of stock listed in her name in the certificate of incorporation (*id.*, fols. 166-167) Clair Greenberg, the other director listed in the certification of incorporation, is a stenograper employed in defendant's own office (*id.*, fol. 168). When she signed this certificate, she was aware she was merely a dummy director (*id.*, fol. 171).

(3)

The defendant took the stand and testified that the purchase money mortgage, deed and bond relating to the transfer of the premises to Amcol Corporation all were executed in his office on January 8, 1959 (*id.*, fols. 292-293). These documents were not recorded until the middle of March of that year, according to his testimony, because of the failure of Walker to submit $140 for payment of the recording fees (*id.*, fols. 293-295). He denied that he had control of or managed the property after January 8, 1959 (*id.*, fol. 301). It was his testimony that Walker, through the Sulroy Realty Corp., was the party then in control (*id.*, fol. 302). Defendant's further denials included the assertion that he never owned any stock in Amcol Corporation or was president of that corporation after July, 1959 (*id.*, fols. 323-324).

All of the 100 shares of the corporation were in the name of Leroy Walker but the defendant asserted that he retained the shares as a security to insure the performance of the contract (*id.*, fols. 328-330). According to his testimony the sole consideration which he received for transferring title to Amcol was the purchase money mortgage. He testified that he received no cash at all (*id.*, fol. 339). The office of the corporation was located in defendant's office (*id.*, fol. 335). All his records concerning the transac-

tion were destroyed, however, following his retirement from the active practice of the law on June 30, 1959 (*id.*, fol. 462).

The defendant called Louis Chernow, an attorney and the notary public who witnessed the subscription of Leroy Walker's signature on the instant purchase money mortgage and bond (*id.*, fols. 418-420). It was his testimony that the papers were signed on January 8, 1959 but he admitted that he had no independent recollection of notarizing the document in question (*id.*, fols. 421, 432).

The Decisions Below

The Criminal Court of the City of New York, County of New York (RINGEL and CREEL, JJ. concurring, IMPELLITERI, not sitting), denied petitioner's application for a writ of *coram nobis* without a hearing, by order entered February 3, 1965. On appeal, this determination was unanimously affirmed without opinion in the Supreme Court, Appellate Term, First Department(CAPOZZOLI, HOFSTADTER, and HECHT, JJ.), by order entered June 3, 1965. After leave was granted by Judge BURKE of the Court of Appeals, that Court also affirmed the determination denying the writ without opinion. Judge VAN VOORHIS dissented and voted to reverse and direct a hearing.

ARGUMENT

***Coram nobis* was properly denied. No substantial federal question is presented herein since all alleged errors not only appeared on the face of the record but also were part of the basis for an unsuccessful motion for a new trial and a lost appeal (14 AD 2d 837). Moreover, there was a complete absence of proof that the convicition was obtained by the fraudulent use of perjured testimony or that the prosecution knowingly withheld evidence favorable to the petitioner.**

(1)

On the proof adduced by the People, the former Court of Special Sessions could have found that the defendant was the owner of 166 West 94th Street on February 26, 1959, the date of the inspection, on either of two separate and distinct theories. First, it could have accepted Leroy Walker's testimony that the transfer of the premises from the defendant to the Amcol Corporation, which ostensibly took place on January 8, 1959, actually occurred in the middle of March, 1959, subsequent to the date charged in the information. Moreover, even if the Court determined that Walker's testimony did not establish defendant's title in February beyond a reasonable doubt, it could have accepted the inescapable conclusion that the transfer of title to Amcol was only a sham and was merely a device employed by the defendant to evade responsibility for the premises, while retaining full control.

In the state of this record and the proof thus adduced, the petitioner now seeks to invoke this Court's jurisdiction on the ground that he was deprived of due process since his conviction was obtained by the use of the perjured testimony of Leroy Walker to the effect that the transfer of title took place in March, 1959, while the prosecution with-

held evidence that the transfer of title was accomplished in January of the same year (cf., *Matter of Morhous* v. *Supreme Court*, 293 N. Y. 131 [1944]). The substance of this argument was raised previously by the defendant, both in his unsuccessful appeal to the Appellate Division, First Department, and in his unsuccessful application for a certificate pursuant to Code of Criminal Procedure, §520, for leave to appeal to the Court of Appeals. These alleged errors were all known to the petitioner at the time of his trial and appeal and there was full opportunity to explore them. Cf. *Kyle* v. *United States*, 266 F. 2d 670 (C A 2nd Cir., 1959), cert. den. 361 U. S. 870 (1959). In those proceedings, the defendant utilized inferences, all drawn from the record on appeal, including exhibits submitted at the trial and in the subsequent motion for a new trial on the ground of fraud, in support of his contentions. There was evidence in the record before the Appellate Division, for instance, that Building Department applications filed January 21, 1959, listing the Amcol Corporation, Leroy Walker, Vice-President, as the owner, were in conflict with Walker's sworn testimony at the Trial as to the date title passed. But this evidence might not have been accepted by the Court of Special Sessions or the Appellate Division since the affidavits of the architect who prepared these documents stated conclusively that the information contained therein was furnished by the defendant, the petitioner herein, and further, that he (the architect) never met Walker until March, 1959 (fols. 800-801). The record, thus falls far short of establishing any lack of honesty or truthfulness on the part of Walker and, at best, an issue of credibility between the defendant and Walker was presented.

Of course, it is well settled that *coram nobis* may not be invoked to test the issue of credibility of witnesses. *People* v. *Bell*, 31 Misc 2d 814 (Gen. Sess., N. Y. Co., 1961),

aff'd 16 AD 2d 624 (1st Dept., 1962), cert. den. 371 U. S. 872 (1962). Moreover, for the purpose of this proceeding and contrary to petitioner's assertions (Petr.'s Br., pp. 15-19), only allegations of fact and not conclusions of law must be treated as true, in the absence of an original hearing. Cf. *Kyle* v. *United States, supra, United States* v. *Rosenberg*, 200 F. 2d 666, 668 (C A 2nd Cir., 1952). Under these circumstances, we may assume that the Trial Court could have believed Walker and found that title had passed after March 13, 1959 since the date title allegedly passed was supplied to the Building Department indirectly by the defendant. If, indeed, this gave rise to an inference damaging to the defendant, he could have gone into the matter on cross-examination. *Cf., McGuinn* v. *United States*, 239 F. 2d 449 (C A D C Cir., 1956). In any event, the Court need not have accepted Walker's evidence at all on this point to convict the defendant, as we shall demonstrate, in view of the conclusive proof that the Amcol Corporation was merely the *alter ego* of Borris M. Komar, the petitioner herein. Cf., *People* v. *Cross & Brown Co.*, 277 N. Y. 701 (1938); cf. also *People* v. *Chodorov*, 12 N Y 2d 176 (1962), cert. den. 375 U. S. 46 (1963).

Petitioner's charge impugning the honesty and integrity of the former Assistant Corporaton Counsel who prosecuted him is, of course, completely irrational and should be rejected. The record in the criminal case established his skill and integrity and requires no further documentation herein (Cf., e.g. *id.*, fol. 512 where the Trial Court complemented the Assistant Corporation Counsel for his preparation and presentation of the case). As to the charge of subornation of perjury, the People could not be expected to be bound by their own records when faced with Walker's explanation that the title papers were not finally executed until on or after March 13, 1959.

Similarly, the alleged suppression of the Building Department record is, also, a complete sham. That file was at all times available to the petitioner who, of course, never requested it, nor did he seek to subpoena it (cf. *People* v. *Komar,* Record on Appeal, Hinchey affidavit, fols. 805-812). His disclaimer of knowledge concerning the existence of the Building Department applications in this file, was properly rejected by the Trial Court in view of the fact that such applications had been prepared by one Krause (defendant's architect since 1950), at defendant's request, from information furnished by defendant and were in turn forwarded by Krause to the defendant, who then sent them to Walker. All of Krause's dealings regarding the building were with the defendant (cf. *id.,* Krause affidavit, fols. 796-804).

Petitioner's further argument, *dehors* this record, relies on his alleged exoneration by the New York City Bar Association as proof that the testimony of the People's witnesses was perjured. His tortured reasoning on this point (Petition, parag. 3, p. 8; Br. p. 17) intimates that since the Trial Court recommended "certain action by the Bar Association with respect to some suspicions of perjury" at the conclusion of the trial (*id.,* fols. 523-524) and no action was ever taken by the Association in the past five years against him and further that since he has not been informed of any such investigation, that the Association must have cleared him and found perjury in the testimony of the People's witnesses. There is, of course, no evidence, however, that any investigation was ever undertaken by the Association in this matter and the record is silent as to whether the Court ever pressed the matter. On this point, we have been authorized by Judge Ringel to state that a majority of the bench reconsidered the matter after trial and decided in October, 1960 not to press charges against the petitioner before the Bar Association "in view of the defendant's age and previous good record."

Under ordinary circumstances, errors appearing on the face of the record are usually not reviewable by writ of *coram nobis*. *People* v. *White*, 285 App. Div. 1045 (1st Dept., 1955), aff'd 309 N. Y. 636 (1956), cert. den. 352 U. S. 849 (1956); *People* v. *Eastman*, 306 N. Y. 658 (1953). Also, *coram nobis* may not be used as a vehicle for an additional appeal or as a substitute for an appeal and "sound reasons" must exist "for failure to seek appropriate earlier relief." *Morgan* v. *United States*, 346 U. S. 502, 512, (1954); cf., also *People* v. *Schwartz*, 12 N Y 2d 753 (1962); *People* v. *Shapiro*, 3 N Y 2d 203 (1957); *People* v. *Sullivan*, 3 N Y 2d 196 (1957); *People* v. *Sadness*, 300 N. Y. 69 (1949), cert. den. 338 U. S. 952 (1950); *People* v. *Kendricks*, 300 N. Y. 544 (1949). The writ is, as Judge FULD succinctly stated in *People* v. *Howard*, 12 N Y 2d 65, 66 (1962), cert. den. 374 U. S. 840 (1963), to be "treated as emergency measure born of necessity to afford a defendant a remedy against injustice when no other avenue of judicial relief is, or ever was, available to him." Cf., also *Morgan* v. *United States, supra; People* v. *Brown*, 13 N Y 2d 201 (1963), cert. den. 376 U. S. 972 (1964).

To avoid the impact of these basic rules, the petitioner now argues (Petr.'s Br., pp. 7-15), that the People may not "take refuge in independent state substantive or procedural rulings in a case where due process of law was disregarded during the trial". However, it is also well settled that the writ "may not be employed to vacate a judgment even though * * * such judgment had been 'procured as the result of a trial during the course of which rulings were made in violation of constitutional right * * * if there was a right to review such rulings on an appeal from the judgment' ". *People* v. *Howard, supra* (12 N Y 2d at p. 67), opinion *per* FULD, J. quoting from *Matter of Hogan* v. *Court of General Sessions*, 296 N. Y. 1, 6 (1946). Cf. also *Adams* v. *United States ex rel McCann*, 317 U. S. 269 (1942); *United*

States v. *Smith*, 306 F. 2d 457 (C A 2nd Cir., 1962); *United States* v. *Gernie*, 287 F. 2d 637 (C. A. 2nd Cir., 1961); *United States* v. *Aderman*, 216 F. 2d 564 (C A 7th Cir., 1954); *United States* v. *Rosenberg, supra; United States* v. *Walker*, 197 F. 2d 287 (C A 2nd Cir., 1952); *Howell* v. *United States*, 172 F. 2d 213 (C A 4th Cir., 1949), cert. den. 337 U. S. 906 (1949).

It follows, therefore, that the errors herein alleged cannot now form a basis for *coram nobis* relief. All questions of perjury and repression of evidence were resolved against this petitioner by the Courts of New York State with full knowledge of all the facts alleged herein. If those Courts had found these contentions to be valid, they could and would have set the judgment of conviction aside and ordered a new trial. Cf. e.g. *Lyons* v. *Goldstein*, 290 N. Y. 19 (1942); *People* v. *Savvides*, 1 N Y 2d 554 (1956); *People* v. *Fisher*, 4 N Y 2d 943 (1958). In any event, the law is well settled that, in the absence of any proof of fraudulent use of perjured testimony by the prosecuting attorney, *coram nobis* does not lie. *Napue* v. *Illinois*, 360 U. S. 264 (1959); *People* v. *Costello*, 8 N Y 2d 954 (1960), cert. den. 365 U. S. 852 (1961), reh. den. 366 U. S. 915 (1961); *People* v. *Oddo*, 300 N. Y. 649 (1950), cert. den. 339 U. S. 961 (1950); *People* v. *Sadness, supra.*

(2)

There was, of course, an overwhelming weight of evidence to support the inference that the petitioner was the actual party responsible for the premises on February 26, 1959. The contract between Walker and the defendant below pursuant to which the Amcol Corporation was formed, was signed on December 12, 1958 (*People* v. *Komar*, Record on Appeal, Peo.'s Exh. 6). The Corporation was formed by the defendant on December 28, 1958 (cf. *id.*, Peo.'s Exh. 4, Certificate of Incorporation). It was

Walker's testimony that he thought that the defendant had executed a deed conveying the property to the Corporation, but in March, 1959, when he was completing arrangements on a building loan from Embar Funding Corporation, he was informed that a search showed that Amcol was not the owner of record. It was only then, according to Walker, on or after March 13, 1959, that the defendant finally executed the deed conveying the property to Amcol. The undisputed fact was that the deed, bond and mortgage were not recorded until March 18, 1959. It appears further, moreover, from defendant's initial correspondence with Walker (*id.*, Peo.'s Exh. 5) that he was merely seeking a contractor "interested in taking part ownership in the building and completing the conversion job." There was no indication in the record that the defendant ever intended to completely divest himself of title to the building.

We submit that, notwithstanding the testimony of the defendant and his notary, there is nothing inherently incredible or surprising on the face of Walker's account. Walker knew in January and February that he had not yet executed the bond and mortgage, but could have been unaware that no conveyance had been made to the Corporation. He could have believed that the defendant executed a deed to the Corporation without having received the bond and mortgage, because, as we will show, the Corporation was merely the *alter ego* of the defendant. Such a conveyance would not have involved any loss of control by the defendant over his property. Certainly, on the basis of this defendant's history of evasion and his incredible reasons for not even filing the January, 1957 Referee's deed by which the property was conveyed to him, defendant has shown himself to be not beyond such a subterfuge to conceal his interest in the building (see *id.*, fols. 319-321, 404-406); *cf.* also *People* v. *Komar*, 10 A D 2d 667 (1st Dept.,

1960). The answer to the question why the defendant felt constrained in March, when he executed the deed, to make it appear as though the conveyance took place in January instead of the date of the actual transfer of title lies in the imminent criminal prosecution which the defendant knew would arise from the Department of Health inspection of February 26, 1959. The false dating of the deed was merely a belated attempt by the defendant to shield himself behind the cloak of corporate immunity.

Moreover, even if this evidence is discounted, the conviction was proper since it conclusively appears in the record that the defendant and Amcol Corporation were one and the same, and the transfer to the Corporation did not divest the defendant of any domination or control over the property. The record showed conclusively that the defendant drew up and filed the corporate papers; that he was the President of the Corporation; that the only directors other than the defendant were a stenographer employed by him and one employed by an associate of his; that the stenographers were merely "dummy directors" and finally that the only stockholders listed in the Certificate of Incorporation were the defendant and the stenographer directors (*id.*, fols. 166-171, 606). Walker's name nowhere appeared on the Certificate of Incorporation. The home office of the Corporation was defendant's office (*id.*, fols. 335, 605, 608), and the defendant was the custodian of the corporate books which were never kept (fols. 353, 354) and which were apparently destroyed in June, 1959 (*id.*, fol. 462).

Further evidence of defendant's complete control over the corporation may be gleaned from People's Exhibit 6, the contract between defendant and Walker, wherein it is provided that defendant and Walker were each to have one-half of the stock in the corporation, but defendant was to

retain all of the stock, endorsed in blank, for security purposes and that Walker was to sign a blank resignation to be held by defendant pending the performance of the contract (*id.*, fols. 623-624). The defendant had to approve the terms of the building loan, all renovation contracts for the premises and all payments for work to be done on the premises (*id.*, fol. 626).

Following the execution of this contract, defendant exhibited a continuing active interest in the property. He retained an architect, David Krause, to file alteration plans with the Building Department (*id.*, fols. 799-800). All dealings between the architect and Amcol Corporation were through defendant (*id.* fols. 800-801). Defendant also sent a draft of a letter to Walker, to be retyped on Walker's stationery and then filed it with the Building Department (see Peo.'s Exh. 7 and Exh. 3 annexed to Komar Affidavit). Other evidence of defendant's active role in the management of the property is found in the correspondence between him and Walker after the property had supposedly been conveyed to Amcol Corporation (*id.*, Peo.'s Exhs. 8-9).

Under the circumstances, the sole inference open to the Trial Court was that defendant was the party responsible for the premises, since he was the person in whom dominion and control of the building were vested. Having failed in his duty to ameliorate the abominable conditions existing therein, defendant was properly found guilty of both charges of the information and the Court properly disregarded the paper title which was supposedly possessed by Amcol Corporation. *Smith* v. *Feigin*, 273 App. Div. 277 (1st Dept., 1948), aff'd 298 N. Y. 534 (1948).

CONCLUSION

The petition for certiorari should be denied.

May 31, 1966

Respectfully submitted,

J. LEE RANKIN,
Corporation Counsel,
Attorney for Respondent.

SEYMOUR B. QUEL,
Of Counsel.

Office-Supreme Court, U.S.
FILED
JUN 10 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1304

BORRIS M. KOMAR,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S REPLY BRIEF

BORRIS M. KOMAR,
Counsel for the Petitioner,
349 East 49th Street,
New York 17, N. Y.

MU 8—3521

ACKERMAN PRESS, Phones BO 9-7107-8

INDEX

PAGE

Argument:

POINT I—Respondent disregards the record and the opinions of the state courts 1

POINT II—Defendant did not waive his Federal Constitutional guaranty of due process, free from prosecutor's deliberate fraud on the Criminal Court 6

POINT III—Facts in the record refute respondent's irresponsible inferences 7

Conclusion 11

Cases:

Case v. Nebraska, 381 U. S. 336 2

Cresswell v. Grand Lodge, 225 U. S. 246 5

Fay v. Noia, 372 U. S. 391 7

Fiske v. Kansas, 274 U. S. 380 5

Fogelson v. Rackfay Const. Co., 300 N. Y. 334 ... 5

Henry v. Mississippi, 379 U. S. 443 6

Higgs v. De Maziroff, 263 N. Y. 473 5

Mesarosh v. United States, 352 U. S. 1 6

Napue v. See, 360 U. S. 264 5

People v. Dalsis, 5 App. Div. (2) 28 8

People v. England, 27 Hun 139 8

Pointer v. Texas, 380 U. S. 400 6

Smith v. Feigin, 273 App. Div. 277, aff'md 286 N. Y. 534 8

Sohmer Factors Corp. v. 278 Corp., 13 Misc. (N. Y.) (2) 142 8

Sterling v. Constantin, 287 U. S. 378 5

Thomas v. Scutt, 127 N. Y. 133 ..... 5, 6

Townsend v. Sain, 372 U. S. 293 7

Statutes:

U. S. Constitution, 14th Amendment 2

N. Y. Code of Criminal Procedure, Section 392 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1304

BORRIS M. KOMAR,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S REPLY BRIEF*

POINT I

Respondent disregards the record and the opinions of the state courts.

Respondent asserts on page 2 of its brief that "that the primary issue presented is whether a writ of *coram nobis* may be used as a vehicle for an additional appeal, where all alleged errors not only appeared on the face of the record," etc.

The only issue presented by the petition *coram nobis* is thus stated in the petition:

"2. That this petition is brought upon the grounds that your petitioner was denied a fair trial within the

* Italics are ours, unless otherwise indicated.

meaning of the due process provisions of the Fourteenth Amendment of the United States Constitution * * *" (R. p. 8).

On the next page 3 of its brief the respondent admits "that the matters raised by the petition were previously presented by the petitioner in a motion for a new trial and in an unsuccessful appeal, *except for the charge of alleged deprivation of constitutional rights*".

If the question of petitioner's deprivation of his constitutional rights was not raised on the trial or on prior appeals, how such deprivation could have become "an error" on the trial?

On pages 13 and 14 of its brief the respondent cites numerous New York cases that errors on trial cannot be reviewed by a writ of *coram nobis*. Thus, New York has no post conviction remedy in cases involving a violation of constitutional guarantees safeguarding life and liberty in criminal cases under United States Constitution. Thus, this case squarely presents the question left open in *Case* v. *Nebraska,* 381 U. S. 336, whether the Federal Constitution compels the States to provide an adequate post conviction procedure to consider complaints based on alleged violations of said federal guarantees. (See Point IB on pp. 11 and 12 of the petition.)

While the question of fact is eliminated in this case by failure of the respondent to demand and the state courts to direct a hearing (Point III of the petition at pp. 17-19) and this Court makes its own examination of facts and is not bound by respondent's statements, respondent completely ignores the opinion of the Court of Special Sessions, and its own admissions in its answer to the petition *coram nobis*:

"9. I have carefully read all the testimony in this case. All the papers, affidavits and exhibits on the

motion to set aside the conviction and for a new trial and the briefs submitted on the appeal to the Appellate Division. *I find that the sole question of fact which was vigorously disputed was: Whether this defendant was the owner or responsible party in control of the premises involved, on the charge dates.* Most of the testimony concerned this question" (R. pp. 19 and 20).

Since the ownership of the premises on the charge date (and there was only one—February 26, 1959) was "the sole question of fact" tried, the speculations of the respondent as to any other possible ground of conviction are without any foundation.

The opinion of the trial court, disregarded by the respondent confirms that the court acted on this, the only controverted issue on the trial solely because it believed *without seeing the city record held by the prosecutor and showing that on January 21, 1959 Walker declared himself the owner of the premises in question, asserted that the title to the premises was in Amcol Residences, Inc. and that the defendant had no interest whatever in said corporation* (R. pp. 10-13) that a perjury was committed in the case. The court said:

> "The motion to dismiss as to each count is denied; the defendant is found guilty of each count.
>
> The Court is also of the opinion after listening most carefully to the testimony in this case that there has been perjury, rampant perjury and subornation of perjury" (R. p. 17).

The only question on this application is, whether the perjury was committed by the prosecutor or by the defendant and the notary public. It was the prosecutor who concealed from the trial court the city record held by the

prosecutor showing admissions of his witness, Walker, that on January 21, 1959 the title to the premises was in Amcol Residences, Inc. On page 6 of its brief, respondent states that early in 1959 (presumably March; R. p. 10) Walker told the defendant "that Amcol was not the owner *of record*". Walker, as an experienced real estate broker, knew that before deed could be recorded it must exist as a duly executed instrument. His use of the well known term proves that the deed must have been executed as it shows on January 8, 1959. And Walker would not have applied to Embar Funding Corporation for a building loan for Amcol, unless he knew that Amcol had the title, for he knew as a broker that loan would not be made except to the owner of the title to the premises in question.

Respondent not only used perjury to obtain conviction but it uses false statements to sustain it. Defendant had only one transaction with architect Krause in 1951 to get an alteration plan approved for the premises. Between 1951 and 1958 defendant had no dealings with Krause whatever. In 1958 at the request of Walker who saved thereby almost a half of architect's fee, defendant informed Krause that he sold the premises to Walker, gave him Walker's address and told him that he wants to refile the alteration plans for the premises in the name of Walker's corporation Amcol. Defendant never received the proposed alteration application from Krause, never forwarded it to Walker, never knew that it was prepared or submitted by Krause to the city, never saw the approved application, and never knew when it was approved by the city and delivered by Krause to Walker. Krause could not be cross-examined by defendant because he was not produced by the prosecutor as his witness, and no affidavit could be procured from him by the defendant because Krause was somewhere in Florida on a vacation when the prosecutor tendered to the Court Krause's colored statement prepared by the prosecutor.

Moreover, if for argument's sake, we assume that defendant gave to Krause the information for city's alteration application, how that helps the prosecution. The application said that fee to the premises on January 21, 1959 was in Amcol, that the only officers and directors of Amcol were Walker and his secretary Ralph Hawkins; that they were the only persons interested in the premises; that Walker was the ultimate owner as he was the only stockholder of Amcol. These were the natural facts that resulted from the transfer of title by defendant to Amcol on January 8, 1959, and Walker, an experienced real estate broker, adopted these facts and confirmed them by his signature on January 21, 1959.

Section 392 of New York Code of Criminal Procedure provides:

> "The rules of evidence in civil cases are applicable also to criminal cases, except as otherwise provided in this Code."

Thus, Walker's testimony attempting the change of dates on the deed, mortgage and bond had no probative value as contrary to parol evidence rule (*Fogelson* v. *Rackfay Const. Co.*, 300 N. Y. 334, 338; *Higgs* v. *De Maziroff*, 263 N. Y. 473, 477; *Thomas* v. *Scutt*, 127 N. Y. 133, 142). Consequently, the record is bare of any facts showing defendant's ownership of the building on February 23, 1959. Motions were made to dismiss the prosecution's case for failure to prove any facts to sustain it both at the end of People's case and of the whole case, and exceptions taken. Conviction without facts to support it in the trial record is a violation of due process and cannot stand. (*Napue* v. *See*, 360 U. S. 264; *Sterling* v. *Constantin*, 287 U. S. 378, 398; *Fiske* v. *Kansas*, 274 U. S. 380, 285-6; *Cresswell* v. *Grand Lodge*, 225 U. S. 246, 261.)

Parol evidence rule was devised to "prevent fraud and injustice", "perjury and infirmity of memory" (*Thomas*

v. *Scutt,* 127 N. Y. 133, 142). Here, the trial court overruled defendant's objection and exception to permit commission of perjury by People's witness. Due process of law required by the Federal and State Constitutions was violated, and the conviction must fall. (See Petition at pp. 16-17 and *Mesarosh* v. *United States,* 352 U. S. 1, 9 and 14.)

The State courts denied defendant's *coram nobis* application solely on the state procedural rule that he should have raised his constitutional objections by an appeal (R. p. 28). This case raises the same question as to the effect of such state rule on the enforcement of guarantees of life and liberty of a citizen under the protective provisions of the United States Constitution as remained unanswered in *Henry* v. *Mississippi,* 379 U. S. 443 (see Point IA in the petition at pp. 8-11).

As Mr. Justice Goldberg said in *Pointer* v. *Texas,* 380 U. S. 400, at page 414:

> "And, to deny to the States the power to impair a constitutional right is not to increase federal power, but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of an individual. In my view this promotes rather than undermines the basic policy of avoiding excess concentration of power in government, federal or state, which underlies our concepts of federalism."

POINT II

Defendant did not waive his Federal Constitutional guaranty of due process, free from prosecutor's deliberate fraud on the Criminal Court.

On pages 9-11 of its brief, respondent cites federal and state cases holding that where the defendant fails to claim a violation of his constitutional rights in prior appeals, he

waives such rights. All of these cases were decided prior to *Fay* v. *Noia*, 372 U. S. 391, 438 and *Townsend* v. *Sain*, 372 U. S. 293, 317, published in 1962.

In *Townsend* v. *Sain, supra*, this Court said at page 317:

> "The standard of inexcusable default set down in Fay v. Noia, 372 U. S. 391, 438 adequately protects the legitimate state interest in orderly criminal procedure; for it does not sanction needless piecemeal presentation of constitutional laches in the form of deliberate by-passing of state procedures."

No claim has been made by the respondent in its brief that the petitioner "deliberately by-passed any state procedures", nor that he "intentionally relinquished or abandoned" any of his constitutional guarantees of life and liberty granted to him by the Federal Constitution. Hence, merely an unintentional oversight in asserting these guarantees on his direct appeal from his conviction was not a bar to his subsequent state application asserting such guarantees by the way of *coram nobis* application, nor is a bar to this petition for a certiorari review of the refusal by the state courts to enforce the due process of law in trial of criminal cases required by the Constitution of the United States.

POINT III

Facts in the record refute respondent's irresponsible inferences.

We have pointed out that the respondent by failing to ask and the state courts by failure to order the hearings on defendant's petition for *coram nobis* waived any question of fact and accepted as true the facts alleged in the petition (see petition at pp. 15 and 16 and Point III at pp. 17-19). Thus, the petition is deemed dismissed solely as a matter of law.

Nevertheless, because of completely irresponsible misrepresentation of facts in the respondent's brief we are constrained to point out the lack of any evidence to support the claims of the respondent. Our references will be to the Appellate Division record improperly submitted by the respondent with its brief,

The cases cited by the respondent are not in point. *Smith* v. *Feigin,* 273 App. Div. 277, aff'md 286 N. Y. 534 and *Sohmer Factors Corp.* v. *278 Corp.,* 13 Misc. (2) 142 are civil cases dealing with piercing of corporate entity.

The law is settled in New York that unless a person connected with a corporation is directly in charge of the maintenance of its properties, he is not chargeable with corporate crimes arising from corporate neglect (*People* v. *Dalsis,* 5 App. Div. (2) 28, 34; *People* v. *England,* 27 Hun 139, 140).

Did the defendant have control over Amcol Residences, Inc. and did he have dominion over the premises?

If the transfer of title to Amcol Residences, Inc. was sham, why Walker would advance incorporation expenses and undertake to finance filing, stamp and mortgage fees (RD, pp. 207-8). Why would Walker hire and pay the architect (RD, p. 227), receive and keep the alteration plans (RD, p. 294), hire the alteration contractor (RD, p. 214) and procure the building loan (RD, p. 87)? Why Walker called himself "purchaser" in the contract of sale on December 12, 1958 (RD, pp. 207-212) and not broker or agent? Why Walker demanded by letter delivery to him *as corporate owner* of corporate books of Amcol Residences, Inc. held by defendant as Amcol's attorney as is customary (RD, p. 255). Why Walker paid five hundred dollars for expenses of building loan, if he did not consider the building his and not defendant's?

If the defendant intended to retain the control of Amcol Residences, Inc., why he did not issue any stock to him-

self? Why the defendant permitted Walker to be the only stockholder with recorded ownership of half of the stock (RD, pp. 219-220)? Why defendant allowed Walker and his secretary Hawkins to be the only officers and directors of Amcol. Why Walker signed all the contracts of Amcol—with the architect, alteration contractor and the mortgagees—and not the defendant. Why Walker never opened a bank account for Amcol, so as to avoid defendant's knowledge of corporate expenses. Why Walker designated as Amcol offices in his alteration application his own office and not that of defendant (R. p. 12).

Defendant employed Kraus as his architect only once in 1951, and Kraus' affidavit as to his dealings with defendant refers only to 1951. Defendant did not supply information to Kraus as to his application in 1959 for alteration as Kraus had all the information as to the building since 1951 in his file and the rest of information was supplied to him by Hawkins, Walker's secretary, when on January 9, 1959 he called on Kraus at his office, paid him fifty dollars deposit supplied by Walker and brought him retainer signed by Walker (RD, p. 257). Defendant never received alteration plans from Kraus nor ever forwarded them to Walker. Kraus brought the application himself to Walker, had him sign it, received from him the balance of his fees and delivered to Walker approved plans (RD, p. 267). Defendant even did not know when any of these events took place and when the plans were approved (RD, p. 257).

Defendant never knew of the Department of Health inspection of the premises until served with summons on March 30, 1959 (RD, p. 11); the books of Amcol Residences, Inc. have never been destroyed but were at the time of trial in possession of attorneys for Swansea Realty Co., Inc. then owner of the premises (RD, p. 123) and the only step taken by defendant as to architect Kraus was to introduce him to Walker so that Walker could

and did save on the architect's fee, because of ready plans in possession of Kraus made in 1951.

All the corporations incorporated in defendant's office for almost fifty years had dummy directors until the first meeting of incorporators as such use simplified filing and preparation of papers in a busy lawyer's office. The initial incorporators were superseded by Walker and his secretary Hawkins as directors and officers of Amcol Residences, Inc. (RT, p. 12) who were independent principals and not dummies of defendant.

Walker not only received *but endorsed* his certificate for 100 shares of Amcol (RD, p. 208) and deposited it with defendant as security for the mortgage as provided in agreement of December 12, 1958 (RD, p. 208).

Defendant did draw a letter to the Building Department for the Amcol corporation, because it was a legal paper required by the Department and defendant was Amcol's lawyer.

Defendant had no control of the premises since December 12, 1958 when he delivered the keys to Walker as purchaser (RD, pp. 69-70).

On May 30, 1959, defendant went with Walker to see the progress on the renovation work on the premises. Walker opened the premises for inspection as defendant had no keys thereto and Walker had. On the same day, he wrote the following letter to Walker:

> "I was really disgusted with the sight of the above premises when we inspected it last week * * *" (p. 71).

Clearly, the control and the duty to maintain the premises in proper condition since December 12, 1958 were in Walker as purchaser and as vice-president of Amcol Residences, Inc. in actual charge of the building and the alteration thereof then in progress. He was a real culprit whom the City deliberately avoided to prosecute in exchange for false testimony.

On January 8, 1959, defendant transferred property worth twenty thousand dollars to Walker without a cent's payment. Defendant had to protect his purchase money mortgage, as he took no stock in the corporate owner, and did not control it. So, he provided that he should hold Walker's stock and the resignations of Walker and his secretary Hawkins as securities for his mortgage, and Walker's compliance with his purchase contract. Defendant's mortgage became valuable only if the building was renovated and rented. Otherwise, defendant held a white elephant subordinated to the building loan, and without substantial market value. Defendant sought and had no control at all, but merely a security.

If the trial court proceeded on this sham ownership theory, then it did not have to brand publicly the defendant as perjurer and another reputable attorney as subornator of perjury, as the facts cited by the respondent in support of its theory of sham ownership were not disputed by either attorney in their testimony. The conclusions from these facts made by respondent are illogical. The sole fact where the testimony clashed was the date of title transfer and this is the fact on which the prosecutor tendered his perjurious witness, Walker.

CONCLUSION

That the petition for a writ of certiorari to the Court of Appeals of the State of New York should be granted, and the said writ be issued to the said Court.

Dated: New York, N. Y., June 11, 1966.

Borris M. Komar,
Counsel for Petitioner.